

**Docket Nos. 4-13-0907, 4-13-0917, 4-14-0218,
and 4-14-0249 (cons.)**

**IN THE ILLINOIS APPELLATE COURT
FOURTH DISTRICT**

**ADAMS COUNTY PROPERTY OWNERS
AND TENANT FARMERS, ET AL.**

Petitioners

V.

**ILLINOIS COMMERCE COMMISSION,
AMEREN TRANSMISSION COMPANY OF
ILLINOIS, ET AL.**

Respondents

(FULL CAPTION FOLLOWS COVER)

On Direct Appeal of Orders of the Illinois Commerce Commission

III.C.C. Docket No.
12-0598

BRIEF OF THE RESPNDENT ILLINOIS COMMERCE COMMISSION

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ATXI is publically needed and should run alongside the property of the ECCDP members, but is limited strictly to ECCDP's lack of notice claim.

The Commission did not abuse its discretion within the meaning of Illinois law. *Tiggins v. Dept. of Employment Security* 2013 IL App (1st) 121677, ¶10 [an abuse of discretion occurs where a ruling is so arbitrary or fanciful that no reasonable person would agree with it]. The Commission's denial of intervention and rehearing to ECCDP should be sustained on administrative review.

A. Illinois law does not require specific notice to the ultimately affected landowners of proceedings before the Commission

All of ECCDP's claims are tied to its claim that Commission proceedings, in which utility projects are approved under Section 8-406.1 of the Act, *supra*, require specific notice to the ultimately affected landowners in order to be constitutionally valid. ECCDP is entirely in error.

ECCDP (Br. at 9) admits that Section 8-406.1 of the Public Utilities Act, 220 ILCS 5/8-406.1, does not require specific notice to the landowners whose lands may be crossed by the underlying project. Section 8-406.1, *supra*, requires the utility to provide public notice in the form of public meetings, newspaper notice of its application, and a dedicated website. 220 ILCS 5/8-406.1(a)(3), (d) and (e). Nothing is said in Section 8-406.1 concerning individual notice to affected landowners. Thus, the notice and hearing requirement in Subsection 8-406.1(f), *supra*, refer back to the statutory notices listed in Section 8-406.1 and not to individual notice to affected landowners, ECCDP's claims notwithstanding (Br. at. 9, 26).

As ECCDP admits (Br. at 9), Clause 8-406.1(a)(1)(B)(viii) of the Public Utilities Act ("Act"), 220 ILCS 5/8-406.1(a)(1)(B)(viii), requires the consideration of at

least two separate routes proposed by the public utility. However, Section 8-406.1 of the Act, *supra*, does not bar other parties from proposing additional routes. Given the tight framework of Section 8-406.1, e.g. Subsections (b), (d), and (g), the General Assembly did not intend for delay because the route finally approved differed from the utility's original proposals. *Knolls Condominium Assn. v. Harms*, 202 Ill. 2d 450, 459 (2002) [the overall intent of the legislature is of paramount importance]. The General Assembly's intent in Section 8-406.1 concerning expediency of filings under the provision is quite clear.

The Commission has rules concerning applications by utilities in which privately owned tracts of land may be affected, notably herein 83 Ill. Adm. Code 200.150(h). This rule has been a Commission rule since at least 1960. The Commission has applied 83 Ill. Adm. Code 200.150(h) to this Section 8-406.1 proceeding (R. Vol. 52, C-12620-C-12628). However, the failure to notify all affected landowners does not invalidate the proceeding, as the face of the rule indicates (notice to owners of record shall not be deemed jurisdictional and... the lack of notice shall in no way invalidate a subsequent order of the Commission). The Commission's application of its rule is reasonable, ECCDP's claims (Br. at 27-29) notwithstanding. *Roman v. Cook Co. Sheriff's Merit Bd.*, 2014 IL App (1st) 123308, ¶ 70 [review of an agency's interpretation of its rules is largely deferential and is examined for a reasonable basis in law]; *Merisant Co. v. Kankakee County Bd. of Review*, 352 Ill. App. 3d 622, 629 (3rd Dist., 2004) [application of an agency rule as written is not plainly erroneous]; and *CIPS v. Illinois Commerce Commission*, 243 Ill. App. 3d 421, 428 (4th

Dist., 1993) [an administrative agency's construction and application of a rule will only be reversed if plainly erroneous].

ECCDP (Br. at 4, 9, 14-15, 20-21) claims that the Commission did not send its members notice of the underlying proceeding. The Commission does not know why the notices the Commission sent were not received (ECCDP Br. 8, 12-13). The Commission's records indicate that it did send notices of the proceeding to ECCDP members. The January 31st notice can be found on pp. 24-25 of the Index, R. Vol. 1. The five-page service list related to the intervenor's alternate proposals can be found on the Commission's e-docket at "01/31/2013 Notice (link), Notice and Notice of Continuance of Hearing" under the link as "Alternate Landowners List." The Appellate Court could take notice of this publically available document. *Illinois Bell Telephone Co. v. Illinois Commerce Commission*, 55 Ill. 2d 461, 468 (1973).¹ This Alternate Landowners List was based on the names and addresses provided by the intervenor (R. Vol. 16, C-03619–C-03623 and C-03626–C-03628).

The Commission notes that ECCDP does not rely on its application for rehearing (R. Vol. 49, C-11851–C-11856); rather its Brief (Br. at. 8, 12, 13, and 19) cites almost exclusively to its Petition to Supplement Due Process Motion to Strike Proceedings as to the Edgar County Segment and Application for Rehearing (R. Vol. C-11899 –C-11952). Said document was filed on October 1 (R. Vol. 1, Index, p. 79) the day before the Commission's denial of rehearing (R. Vol. 49, C-11980) and was filed 42 days after the service date of the final order, well outside the 30 days for filing the application for rehearing. 220 ILCS 5/10-113(a). *People ex rel. Illinois Highway*

¹ The Commission intends to submit the Alternate Landowners List in a supplemental record.

Transportation Co. v. Biggs, 402 Ill. 401, 497 (1949) [The time for filing applications for rehearing is statutory and cannot be extended by either the parties or the Commission] and *Liberty Trucking Co. v. Illinois Commerce Commission*, 81 Ill. App. 3d 466, 469-470 (2nd Dist., 1980) [the 150 days for the Commission to decide a rehearing cannot be extended]. The 20 days given to the Commission to grant an application for rehearing is not an open period by which a party can add ever increasing claims and statements. 220 ILCS 5/10-113(a). Both legally and factually ECCDP's late filing was not properly before the Commission.

ECCDP (Brief, p. 21) makes much of a claim that its last-minute filing was not exhaustively studied by the ALJ, when the ALJ compared the late-filed affidavits of members of ECCDP with the list upon which the Clerk's Office had used. Oddly, ECCDP claims that the ALJ relied on the opposition filed by a party to the proceeding (R. Vol. 49, C-11958–C-11964), whereas primarily the ALJ compared the names with the Chief Clerk's Alternate Landowners List (R. Vol. 52, C-12622–C-12623), which can be found on the Commission's e-docket, *supra*.

Examination of the only affidavit (R. Vol. 49, C-11855)² which was timely filed with ECCDP's application for rehearing, shows that Mr. Christopher Patrick and his wife are found on the service list the Chief Clerk used (Alternate Landowners List, p. 2, left col. on e-docket; R. Vol. 16, C-03620 and C-03627). The address matches the address on the letter that Mr. Patrick received from ATXI (*Id.*, C-11856). ATXI contested that Mr. Patrick did have notice of the Commission's proceeding (R. Vol. 49, C-11893–C-11894 and C-11897–C-11898). See also ALJ's Memo of September 25,

² Even on Commission's e-docket, the first page of Mr. Patrick's affidavit was not submitted to the Commission.

2013, p. 5, *Id.*, C-11977. ECCDP has not met its burden of proof that the notice was not sent to Mr. Patrick. 220 ILCS 5/10-201(d). *Continental Mobile Telephone Co. v. Illinois Commerce Commission*, 269 Ill. App. 3d 161, 171 (1st Dist. 1994) [the opposite conclusion to the Commission's findings must be clearly evident].

As to the various untimely affidavits filed by ECCDP (R. Vol. 49, C-11903 –C-11952), a review of the Alternate Landowners List on e-docket showed that all but two sets were listed on the Alternate Landowners List which the Clerk's Office used to mail the January 31st notice. There are some anomalies (R. Vol. 52, C-12622–C-12623). The Smittkamps (*Id.*, C-11921) are listed as Smittkimp at the same address (Alternate Landowners List, p. 2, left col. on e-docket; R. Vol. 16, C-03620 and C-03627). The Williamsons (R. Vol. 49, C-11903 and C-11905) show two different addresses. The January notice was sent to one (Alternate Landowners List, p. 3, left col. on e-docket; R. Vol. 16, C-03621), which is the same address at which the ATXI letter was received (*Id.*, C-11905). Mr. Brent Becker (R. Vol. 49, C-11913) holds this land as the "Brent Becker Living Trust" at the same address to which the January notice (Alternate Landowners List, p. 3, left col. on e-docket; R. Vol. 16, C-03621), as well as ATXI's original notice to landowners (R. Vol. 2, C-00118; 11/21/2012 "Notice of Setting" link, under Link, "Landowners List" p. 79 of 139), were sent. There is a transposition in the address for the Eitels: 2125 instead of 1225 N. High Street (Alternate Landowners List, p. 2, right col. on e-docket; R. Vol. 16, C-03620 and Vol. 49, C-11927 and C-11929).

Of the late-filed affiants who are not listed on the Alternate Landowners List (R. Vol. 49, C-11961), Priscilla Rhoads (R. Vol. 49, C-11941 and C-11943) was mailed a notice related to ATXI's original proposals concerning her property (R. Vol. 2, C-

00120; 11/21/2012 “Notice of Setting” link, under Link, “Landowners List” p. 32 of 139). As for James and Julie Soliday Fluckey (R. Vol. 49, C-11915, C-11917, and C-11919), a Julie and Winemiller Soliday appear on ATXI’s original proposals at the same address in Dennison IL (R. Vol. 2, C-00121; 11/21/2012 “Notice of Setting” link, under Link, “Landowners List” p. 37 of 139). A Carol Winemiller of unknown address is also a member of ECCDP (R. Vol. 48, C-11788).

Thus, there is one misaddressed notice and two sets of landowners, who do not appear on the Alternate Landowners List. Both of the missing sets of landowners, as well as at least one of the landowners who also supplied the late-filed affidavits, however, were mailed a notice concerning ATXI’s original proposals and ignored ATXI’s required statutory notices. 220 ILCS 5/8-406.1(a)(3), (d) and (e). ECCDP’s claim (Br. 12) that the post-decisional Ameren letter was the first notice for all of its members is not true, even assuming that none of the ECCDP received the notice issued after January 31, 2013. The Commission notes that mere technical errors, assuming any are found, are not sufficient to overturn the Commission’s decisions to deny rehearing and intervention herein. Section 4-401 of the Act, 220 ILCS 5/4-401.

The foregoing analysis probably offers more detail than resolution of ECCDP’s issue requires since ECCDP’s lack of notice claim is tied only to the unsupported claim that Commission proceedings, in which utility projects are approved under Section 8-406.1 of the Act, *supra*, require specific notice to the ultimately affected landowners in order to be constitutionally valid.

B. The failure to specifically notify affected landowners of the Commission proceedings does not offend constitutional due process

ECCDP's lack of notice claim is not based on a statutory right to specific notice to affected landowners. 220 ILCS 5/8-406.1. EDDCP's claim is not based on an absolute right of specific notice to affected landowners established in a rule, since the rule (83 Ill. Adm. Code 200.150(h)) on its face does not give an absolute right of specific notice and the rule was reasonably applied by the Commission. *Roman v. Cook Co. Sheriff's Merit Bd.*, 2014 IL App (1st) 123308, ¶ 70; *Merisant Co. v. Kankakee County Bd. of Review*, 352 Ill. App. 3d 622, 629 (3rd Dist., 2004); and *CIPS v. Illinois Commerce Commission*, 243 Ill. App. 3d 421, 428 (4th Dist., 1993). The Commission's and ALJs' concern (ECCDP's Brief, pp. 16-18) to try to get specific notice to affected landowners does not rise to a legal guarantee of specific notice. ECCDP does not provide any citation to authority establishing a guarantee of specific notice. Sup. Ct. Rule 341(h)(7).

EDDCP's merely generalized claim to specific notice on constitutional grounds, on matters arising from the Commission's discretionary authority to deny intervention and rehearing, constitutes a fundamental fairness issue which involves a mixed question of facts and law rather than a question of law (Br. 5). *Fox Moraine, LLC v. United City of Yorkville*, 2011 IL App (2d) 100017, ¶ 59. Assuming *arguendo* that a failure of specific notice occurred, such a failure does not render the underlying Commission decisions clearly erroneous. Section 4-401 of the Act, 220 ILCS 5/4-401. *Chicago Messenger Service v. Jordan*, 356 Ill. App. 3d 101, 106-107 (1st Dist. 2005) and *Murphy v. Board of Review*, 394 Ill. App. 3d 834, 836-837 (1st Dist., 2009).

ECCDP cites to cases concerning prejudgment replevin of goods (*Fuentes v. Shevin*, 407 U.S. 67, 82-83 (1972)); newspaper notice to unknown and known beneficiaries of a common trust fund (*Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 317-320 (1950)); the removal of the right to teach (*Lyon v. Dept. of Children and Family Services*, 209 Ill. 2d 264, 273-274 (2004)); and the cancellation of previously awarded certificate to construct and operate a common-carrier pipeline (*Quantum Pipeline Co. v. Illinois Commerce Commission*, 304 Ill. App. 3d 310, 315 (3rd Dist., 1999)).³ However, ECCDP's interest here does not rise to the level of the property rights considered in those cases. Bluntly, ECCDP does not have a property interest in ATXI's certificate to operate a transmission line or authorization to construct the same, the subject of the underlying Commission proceeding in this case. 220 ILCS 5/8-406.1 and 8-503. See ECCDP's Brief, p. 8, citing R. Vol. 1, C-00001–C-00004.

Inherently ECCDP's constitutional argument misapprehends Illinois law. A Section 8-406.1 proceeding is one in which the Commission determines if the utility's project meets public convenience and necessity standards as set forth in Subsection 8-406.1(f) of the Act., *supra*. In such a proceeding, the landowners' rights are not affected as a matter of Illinois law. Only if and when a condemnation action is brought against a particular landowner are the rights of the landowner affected. *Illinois Power Co. v. Lynn*, 50 Ill. App. 3d 77, 81 (1977), citing *Zurn v. City of Chicago*, 389 Ill. 114, 129-132 (1945). See *Egyptian Electric Cooperative Assn. v. Commerce Commission*,

³ The Commission notes that ECCDP's Brief (pp. 1 and 15) did not cite to the official reports as required by Supreme Court Rules 6 and 341(g). The *Lyon* case appears to be *Lyon v. Dept. of Children and Family Services*, 209 Ill. 2d 264, 272 (2004). The other case is *Quantum Pipeline Co. v. Illinois Commerce Commission*, 304 Ill. App. 3d 310, 315 (3rd Dist., 1999).

33 Ill. 2d 339, 342-343 (1965) [landowner's rights as landowner are not affected by grant of Commission to bring the eminent domain action (now 220 ILCS 5/8-509) but rather are properly asserted in condemnation action]. Indeed in *Quantum Pipeline Co. v. Illinois Commerce Commission*, 304 Ill. App. 3d 310, 321-325 (3rd Dist., 1999), an opinion which ECCDP cites, there are two concurring opinions the gist of which conclude that the affected landowners are fully protected when the condemnation action is brought and, therefore, were not necessary to the Commission proceeding, where lack of notice to the affected landowners was the only stated basis for the Commission's reopening of Quantum's certificate proceeding (304 Ill. App. 3d at 314).

Thus, ECCDP's claim in its petition [for rehearing] (R. Vol. 48, C-11852, ¶7), but not raised in its brief, that the Administrative Review Law, 5 ILCS 100/10-25(a), requires specific notice to the ultimately affected landowners is meritless in view of the fact that the Commission proceeding is not a contested case regarding said landowners' rights. The "individual rights, duties and privileges" of the landowners are not being determined herein. 5 ILCS 100/1-30. *Advanced Systems, Inc. v. Johnson*, 126 Ill. 2d 484, 503-506 (1989) [quasi-legislative determination of the real estate equalization "multiplier" with a statutory newspaper notice is not a contested case within the meaning of the APA for affected real estate owners]. Compare with 220 ILCS 5/8-406.1(a)(3), (d) and (e) [statutory notices]. *Illinois Power Co. v. Lynn*, *supra*, 50 Ill. App. 3d at 81-82, and *Quantum Pipeline Co.*, *supra*, 304 Ill. App. 3d at 321-325. The Commission's denial of rehearing did not abuse its discretion where the law relied upon by ECCDP does not apply to ECCDP in this proceeding.

Accepting ECCDP's position would lead to an absurd and unworkable construction of Section 8-406.1 of the Act, *supra*. Although ECCDP claimed that it was accepting the record as it was at the time of its intervention and rehearing (R. Vol. 48, C-11789, ¶4 and Vol. 49, C-11852, ¶5), in fact ECCDP asked that the record established during these proceedings be stricken (*Id.*, C-11853), everything to be redone in the 150 days of rehearing, in order to give ECCDP the chance to cross-examine on the merits and voice their opposition that this transmission line not be placed next to their properties. Although ECCDP claimed that it may provide its own new route, such new evidence was not provided in their application for rehearing and, therefore, could not be considered. 83 Ill. Adm. Code 200.880(a) [statement of any proposed new evidence] and (c) [if new facts are alleged, there must be a verification with the application for rehearing]. ECCDP's procedural scheme is unworkable. *Schultz v. Performance Lighting, Inc.*, 2013 IL 115738, ¶¶20-21 [absurd constructions of statutes are to be avoided] and *Connor v. City of Elmhurst* 28 Ill. 2d 221, 228 (1963) [construction rejected as an unworkable statutory scheme]. The expediency intended by the General Assembly in Subsections 8-406.1 (b), (d), and (g) of the Act, 220 ILCS 5/8-406.1(b), (d) and (g), militates against ECCDP's proposed procedure.

Due process is a flexible concept and requires only such procedural protections as fundamental principles of justice and the particular situation demand. *Abrahamson v. Illinois Department of Professional Regulation*, 153 Ill. 2d 76, 92 (1992); *accord Scott v. Department of Commerce & Community Affairs*, 84 Ill. 2d 42, 51 (1981); *compare Petersen v. Plan Comm. of Chicago*, 302 Ill. App. 3d 461, 468 (1st Dist., 1998) (all aspects of due process protection need not be afforded at a fact-gathering hearing

conducted before a plan commission). The denial of ECCDP's intervention and request for rehearing, under the facts herein, did not violate due process and was fundamentally fair.

ECCDP attempts to elevate the rights of potentially affected landowners in a manner not contemplated by the General Assembly and contrary to Illinois law. ECCDP has received all the notice concerning the underlying proceeding that is required under Illinois law, which does not include specific notice to the ultimately affected landowners. The Commission did not abuse its discretion in denying ECCDP's application for rehearing and motion to intervene. The Commission's decision on ECCDP's lack of specific notice to affected landowners is not clearly erroneous. The underlying proceedings were fundamentally fair. The decisions to deny intervention and rehearing to ECCDP (R. Vol. 49, C-11965–C-11966 and C-11980–C-11981) should be affirmed.

IV. MSSCLPG Misconstrues Section 8-406.1 of the Act and Fails to Meet its Burden of Proof

Subsection 8-406.1(f) of the Act, *supra*, provides, in relevant part, that:

“The Commission shall, after notice and hearing, grant a certificate of public convenience and necessity filed in accordance with the requirements of this Section if, based upon the application filed with the Commission and the evidentiary record, it finds the Project will promote the public convenience and necessity and that all of the following criteria are satisfied:

- (1) That the Project is necessary to provide adequate, reliable, and efficient service to the public utility's customers and is the least-cost means of satisfying the service needs of the public utility's customers ...[.]”

220 ILCS 5/8-406(f)(1) (emphasis added)